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No. 1047

IN THE

SUPREME COURT OF THE UNITED STATES

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 8, 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ------

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review a decree of the United States Court of Appeals for the Second Circuit which affirmed respondent's order denying exemptions from annual license charges billed against petitioner pursuant to § 10(e) of the Federal Power Act in connection with the St. Lawrence navigation power project.

Citation to Opinion Below

The opinion of the Court of Appeals for the Second Circuit (Waterman, J.) dated December 8, 1964 is reported at 339 F. 2d 269. A copy of the opinion is annexed (Appendix p. 1a *et seq., infra*).

Jurisdiction

The case was initially decided by the Second Circuit Court of Appeals December 8, 1964. A timely petition for rehearing or in the alternative for hearing *en banc* was denied January 11, 1965. The decree of the court was entered January 12, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and § 313(b) of the Federal Power Act (herein called the "Act").

Questions Presented

1. Does the exemption from annual charges afforded states and municipalities by § 10(e) of the Act where licenses are issued in connection with projects primarily designed to provide or improve navigation apply to a joint navigation-power project located partly in the United States and partly in Canada a portion of which was constructed by a municipality within the definition of § 3(7) and the remainder by a public corporation established by the United States Government, a public corporation established by the Canadian Federal Government and a commission established by the Ontario Provincial Government?

2. Where exemption from annual charges is sought on the ground that the license with respect to which the charges were levied was issued in connection with a project primarily designed to provide or improve navigation, is the definition of "project" in § 3(11) of the Act as a "complete unit of improvement or development * * * including navigation structures" controlling or does the Federal Power Commission have a right to disregard that definition and deny exemption on the ground that it licensed only part of the project works constituting the entire project and on the ground that the municipal licensee did not construct the entire project?

3. Assuming that the Commission was correct in narrowly defining "project" as consisting solely of the por-

tion of the project works of the entire project which were licensed by the Commission—the entire project having concededly been designed to provide or improve navigation—are such licensed project works to be construed as having been designed primarily to provide or improve navigation when they were designed in a completely different fashion from the manner in which they would have been designed if the primary interests of navigation were not involved, when as a result of this design such project works cost many millions of dollars more than they would otherwise have cost and when some of them would not have been built at all except for the needs of navigation?

4. Is a licensee entitled to exemption from annual charges pursuant to § 10(e) of the Act on the ground that its power is sold to the public without profit when

(a) such licensee is forbidden by law to sell power for profit,

(b) such licensee uses all revenues received to pay costs of operation and maintenance and for interest on and amortization of indebtedness in accordance with the statute which created it and its contracts with bondholders, and

(c) such licensee is forbidden to use revenue to finance new improvements and is mandated to reduce its rates as its facilities are amortized?

5. Is respondent's Regulation 11.24(d) which purports to define the term "profit" as used in the statute invalid on the ground that it is contradictory on its face and on the further ground that it is inconsistent with the statute in that the definition makes it impossible for power to be sold without profit unless it is sold at a loss?

6. Is respondent's Regulation 11.24(d) invalid in that it refuses to allow the cost of amortizing capital debt by public bodies to be considered as part of the cost of doing business in determining profit?

7. In construing the language of § 10(e) of the Act was the court below correct in holding that the words of the statute should not be given their plain everyday meaning because "the Federal Power Act was written for technicians, not for laymen"?

8. In this case, where there is absolutely no dispute whatever as to the facts bearing on the issues considered by the court below, are respondent's determinations as to what constitutes a project and what constitutes profit within the meaning of § 10(e) of the Act "findings as to fact" within the meaning of § 313(b) of the Act which provides that such findings shall be conclusive if supported by substantial evidence or are the Commission's determinations as to what constitutes a project and what constitutes profit determinations of questions of law and subject to review by the Court of Appeals?

Statutes and Regulation Involved

Section 10(e) of the Federal Power Act (16 U. S. C. § 802(e); 41 Stat. 1068, 49 Stat. 842):

> "§ 10. All licenses issued under this Part shall be on the following conditions:
>
> * * *
>
> (e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; * * *
>
> *Provided further,* That licenses for the development, transmission or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities

primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; * * *"

Section 3, subdivisions (7) and (11) of the Federal Power Act (16 U. S. C. § 796 (7), (11); 41 Stat. 1063, 49 Stat. 838):

"§ 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * *

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;"

Section 313(b) of the Federal Power Act (16 U. S. C. § 825 *l*; 49 Stat. 860):

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United

States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order

> of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

Section 11.24(d) of the "Regulations Under the Federal Power Act" (18 C. F. R. 11.24(d)):

> "(d) *Sales to public.* No State or municipal licensee shall be entitled to exemption from the payment of annual charges on the ground that power generated, transmitted, or distributed by the project is sold to the public without profit, unless such licensee shall show:
>
> (1) That it maintains an accounting system which segregates the operations of the licensed project and reflects with reasonable accuracy the revenues and expenses of the project;
>
> (2) That an income statement, prepared in accordance with the Commission's Uniform System of Accounts, shows that the revenues from the sale of project power do not exceed the total amount of operating expenses, maintenance, depreciation, amortization, taxes, and interest on indebtedness, applicable to the project property. Periodic accruals or payments for redemption of the principal of bonds or other indebtedness may not be deducted in determining the net profit of the project."

Statement

Petitioner, a public benefit corporation established by Article V of the New York Public Authorities Law and a municipality as defined in § 3(7) of the Act (16 U. S. C. § 796(7)) petitioned the Court of Appeals for the Second Circuit under § 313(b) of the Act to review an order of the Federal Power Commission denying exemptions from annual charges imposed pursuant to § 10(e) in connection with a license granted petitioner by the Commission pursuant to § 4(e) for the construction and operation of project works

constituting part of the total project works of the St. Lawrence navigation-power project in the International Rapids Section of the St. Lawrence River. The Court of Appeals on the basis of an opinion by Judge Waterman concurred in by Judges Moore and Smith affirmed respondent's order.

Petitioner made timely application for rehearing or in the alternative for hearing *en banc*. The court rejected the application.

The annual charges from which exemption was sought amounted to $114,235.50 and covered part of the year 1958 and the years 1959, 1960 and 1961. Charges for the years 1962 to 1964 amounted to $125,369.00 and while not subject to this litigation the same principles apply.*

The grounds upon which exemption was sought were that petitioner was entitled to exemption pursuant to § 10(e) of the Act because the project in connection with which the license was granted was primarily designed to provide or improve navigation and because the power produced by petitioner was sold to the public without profit.

The international St. Lawrence navigation-power project was authorized by an October 29, 1952 order of the International Joint Commission pursuant to the 1909 Boundary Waters Treaty between Great Britain and the United States (36 Stat. 2448; A. 246**). The order was issued at the request of the Governments of the United States and Canada

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* The Commission has so far billed the petitioner $384,031.00 for charges in connection with its Niagara Project for the years 1961 through 1964 with respect to which petitioner is also seeking exemption. The Niagara project was specifically authorized by Act of August 21, 1957, P. L. 85-159, 16 U. S. C. §§ 836, 836-a.

** Citations "A. . . ." are to the Joint Appendix filed in the court below which has been certified to this Court.

and was based upon exchanges of notes between the two countries (A. 254-296).*

The order provided that the project be constructed pursuant to a plan most of the general outlines of which had been devised by a board of engineers appointed by the President of the United States and the Prime Minister of Canada. The plan was described in a report prepared in 1940 and issued January 3, 1941 which the court below referred to as the 1940 Report (Appendix p. 4a). It will hereinafter be called the 1940 Report.

The project was constructed between 1954 and 1960. It backed up the water for about 40 miles and thus eliminated the rapids in the International Section of the River. It consists generally of:

(1) Long Sault Dam, a control dam at the foot of the International Rapids Section of the St. Lawrence River from the United States mainland to Barnhart Island (an island wholly in the United States).

(2) An international power dam containing turbines and generators and extending from the Island to Canada.

(3) Iroquois Dam, an international control dam 28 miles upstream.

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* Resort to the International Joint Commission and the 1909 Treaty constituted a successful device to get the project built without the approval of either house of Congress. For many years successive Presidents of the United States had sought to bring about the project but the Senate had refused to consent to ratification of a treaty, the Congress had refused to approve an executive agreement and Congress had refused to enact legislation as successively requested. In all the futile efforts which had been made to bring about the project emphasis was on navigation rather than power. The efforts had failed because of the opposition of interests opposed to the opening of the Great Lakes to deep-water navigation from the ocean by eliminating the International Rapids Section of the St. Lawrence River and making it possible for ships of 27-foot draft to ply the waters in place of the vessels of 14 feet which could be accommodated by then existing canals on the Canadian side (A. 266-268, 299-326).

(4) Many miles of dikes on either side of the River.

(5) Many millions of dollars worth of channel excavation both above and below the dams.

(6) Relocation of villages, buildings, railroads, highways and great rehabilitation work.

(7) A canal and two locks to take 27-foot shipping around the lower two dams.

(8) A canal with one lock to take 27-foot shipping around the Iroquois Dam.

(9) Facilities on the Canadian side necessary to continue 14-foot navigation during construction.

(10) Switchyards and accessory power equipment on both sides (A. 37, 38).

The International Joint Commission order provided that the bulk of the work except for the canals and locks and some channel excavation should be performed by The Hydro-Electric Power Commission of Ontario (Ontario-Hydro) and a power entity to be designated by the United States (petitioner herein). The two entities were required to share the cost of the work regardless of which did the actual construction and in which country it was located (A. 278-286).

A good part of the work the two entities were required to perform was solely for the benefit of navigation and would not have been performed except to provide 27-foot navigation to replace the 14-foot navigation which for many years had been provided by canals on the Canadian side of the River. Much of the work would not have been performed at all if the prime object of the project were development of power (A. 27-37).

The 1952 order left open the exact location of the canals and locks which the 1940 Report contemplated would be built on the United States side. The 1952 order in effect provided that they would be built on the Canadian side unless within a short period of time Congress authorized

their construction by a United States federal entity on the United States side (A. 278-286).

Congress finally did pass legislation in 1954 (68 Stat. 92, 33 U. S. C. §§ 981 *et seq.*) establishing the United States St. Lawrence Seaway Development Corporation and authorizing it to construct navigation facilities on the United States side but only after the Power Authority had already been designated by the President of the United States and licensed by the Federal Power Commission to be the United States power entity involved. This statute by its terms was to be effective only if petitioner and Ontario-Hydro would give formal assurance to the Seaway Development Corporation that they would actually construct all the works the 1952 order required them to construct. They did give such assurance. The Seaway Development Corporation did build a canal with two locks around the two downstream dams but the Canadians insisted on building the canal to take traffic around the Iroquois dam on their side (A. 296-298, 316-322).

Thus petitioner and Ontario-Hydro were required to construct virtually the entire works constituting the total project except for the canals and locks and some channel excavation which the two federal corporations constructed and performed. In addition to the channel excavation performed by the Federal agencies the power entities were required to perform channel excavation costing many millions of dollars. Most of it would not have been necessary except for navigation purposes (A. 30-31, 266-268).

The cost of the work done by the two power entities was about $667,000,000. The total cost of project works built by petitioner was $366,364,543. Works built by Ontario-Hydro cost $300,764,897. Except for electrical equipment petitioner and Ontario-Hydro shared all costs equally regardless of where the work in which the costs were incurred was performed. Petitioner performed considerable excavation and built part of Iroquois Dam in Canada. Ontario-Hydro performed some excavation and considerable other work in the United States. The net cost to petitioner including the cost

of electrical equipment was $351,708,292. $281,351,253 of that amount benefited navigation (A. 37, 38; Exhibit 33).

The total expenditures of the St. Lawrence Seaway Development Corporation in the International Rapids Section was only $127,400,000. Of the $479,108,292 spent by United States entities $408,751,253 benefited navigation (A. 38).*

Canadian facilities solely for navigation consisting largely of one lock and a canal and more channel improvements were constructed by the St. Lawrence Seaway Authority (Canada). The estimated cost to the Canadian Dominion government was $17,000,000 for work in the International Rapids Section (A. 244-245).

Petitioner and Ontario-Hydro spent $30,000,000 to construct Iroquois Dam although it was of no benefit to power. They spent $100,000,000 on 61,000,000 yards of channel excavation although 53,000,000 yards of it was essential to navigation and of little or no benefit to power production (A. 28-31, 38; Exhibit 33).

In addition to performing construction work for the benefit of navigation petitioner was required by its license to donate to the Seaway Corporation any of its land the corporation demanded. It was also specifically required to permit control of the reservoir for navigation purposes (A. 161-162).

The 1909 Treaty specifically gives preference to navigation over power in the use of boundary waters.** The Inter-

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* All the works constructed by petitioner and Ontario-Hydro benefit navigation except the turbines, generators, switchyards and accessory equipment (A. 27, 38).

** The 1909 Boundary Waters Treaty provides:

> "The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:
>
> (1) Uses for domestic and sanitary purposes;
>
> (2) Uses for navigation, including the service of canals for the purposes of navigation;
>
> (3) Uses for power and for irrigation purposes."
>
> (Article VIII; 36 Stat. 2448; A. 250).

national Joint Commission's 1952 order specifically provided for that preference. The order established a joint board of engineers to approve the plans for the project and monitor the construction. These plans and that board required that the project works be designed and constructed primarily for the benefit of navigation. Thus they were constructed in a completely different fashion from the manner in which they would have been constructed except for the interest of navigation. For example, the Long Sault Dam from the United States mainland to Barnhart Island which extends across the south channel of the river thus diverting all of the water into the north channel so it will go over the power dam, instead of being a structure with 30 gates could have been built with a simple spillway except for the purposes of navigation. The cost of a simple dam would have been very much less (A. 20-29).

Except to promote the interests of navigation some of the project works including Iroquois Dam which the power entities were required to build would not have been built at all (A. 28, 30-31).

The 1909 Treaty and the 1952 order give preference to navigation over power in the regulation of the river and in the operation as well as in the design and construction of the project. Water is held back and stored in the upper reaches of the river and in Lake Ontario at times when it is badly needed for power in order to make it available when needed for navigation. This is true even in the wintertime when power demands are very large and when there is no navigation at all. Water is stored in the winter to be available during the shipping season (A. 20-25; 32-33; 107-108; 250; 281).

A complicated plan of regulation of the river promulgated by the International Joint Commission has eleven criteria only three of which are for the benefit of power (A. 107-108).

The power entities regulate the river under the monitorship of a Board of Control established by the Commission.

The Board of Control follows the dictates of the Treaty and the Commission's order for the prime benefit of navigation (A. 22).

Petitioner's activities are restricted by law to the construction at St. Lawrence for the purpose of improving the St. Lawrence River for navigation and power and to the construction of a project in the Niagara River with the added objective of improving and preserving the beauty of Niagara Falls. Petitioner is required to finance its projects by the sale of revenue bonds and to sell its power at rates barely sufficient to cover the cost of operation and maintenance of the projects and interest on and amortization of the bonds. As bonds are retired and interest and amortization costs are reduced petitioner is required to reduce the prices at which it sells its power (N. Y. Pub. Auth. L. §§ 1005, 1012).

From the inception petitioner has charged rates which in compliance with the statute barely cover its obligations (A. 11-18).

Petitioner's Federal Power Commission license requires it to give free to the St. Lawrence Seaway Development Corporation all power needed to operate the locks and needed for other navigational purposes.* Except for the power thus donated and power used by the Authority itself the entire output of the St. Lawrence project is sold. Part is sold directly to consumers including the United States Air Force Base at Plattsburgh. The balance is sold for resale to the Public Service Commission of Vermont and to rural electric cooperatives, municipalities and power companies in the New York State all of which are required by statute and contract to resell it without profit (A. 162, 224).

The Federal Power Commission denied the application petitioner made for exemption from license charges on the

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* Respondent granted a small partial exemption from annual charges based on this power and other power used for "state or municipal purposes" (A. 237).

ground that the St. Lawrence project was primarily designed to provide or improve navigation. A majority of the Commission held that while § 10(e) of the Act provides "that as to projects constructed by states and municipalities primarily designed to provide or improve navigation" licenses shall be issued without charge petitioner is not entitled to exemption because the term "project" as used in that part of the Act does not apply to the complete unit of development constituting the entire St. Lawrence Project but only to the specific project works licensed by the Commission and constructed by petitioner.* They held that although the entire project was primarily designed to provide or improve navigation the licensed project works were not. The majority further held that in order to be eligible for exemption petitioner would have had to construct the entire project (A. 227-230).

Commissioner Ross dissented from the part of the majority opinion

> ". . . which finds that the development of the International Rapids section of the St. Lawrence River can be separated into two projects, one navigation, and the other power. However, since the greater part of the Seaway was not constructed by the Authority, Commissioner Ross believes that an exemption to the Authority would be inconsistent with the legislative purpose of Section 10(e) of the Federal Power Act." (A. 238).

The Court of Appeals agreed with the majority of the Commission that within the meaning of § 10(e) of the Act the St. Lawrence project comprised only the project works inside the United States licensed to petitioner despite the fact that § 3(11) of Act defines "project" as a complete unit of development. The court refused to review the Commis-

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*Section 4(e) of the Act authorizes the Commission to license project works not projects (*Lake Ontario Land Development, etc. v. F. P. C.*, 212 F. 2d 227).

sion's determination that those particular project works were not designed primarily to provide or improve navigation even though the facts overwhelmingly indicated this to be the case and even though there was no dispute as to such facts. The court took the position that the provision of § 313(b) of the Act that factual determinations of the Commission are conclusive if supported by substantial evidence applied to the Commission's holding in this regard. The court said that the facts that the 1909 Treaty, the 1952 International Joint Commission order and the Federal Power Commission license gave preference to navigation over power

> "no more prove that the primary purpose of the project was to facilitate navigation than a provision for a draw on a bridge over the St. Lawrence would prove that the primary purpose of the bridge was to aid navigation." (Appendix p. 8a).

The court said that the fact that project features would have been designed differently and less expensively except to promote navigation and the fact that they were operated to the advantage of navigation and the disadvantage of power

> "need prove no more than that ease of shipping is an important secondary value of the project and at times should be given the right of way." (Appendix p. 9a).

It said the Commission was not required to regard these facts as conclusive on the issue of whether the project was designed primarily for navigation *(id.)*.

The Commission denied petitioner's application for exemption on the ground that project power was sold without profit because its Regulation 11.24(d) provides that in determining profit the cost of amortizing bonds may not be considered as part of the expense of doing business.

The court in effect refused to review the Commission's finding. It did so first because it said that the Congress by

§ 309 of the Act authorized the Commission to prescribe regulations to carry out the provisions of the chapter

> "including definitions of 'accounting, technical and trade terms' used in the act." (Appendix p. 10a).

The court took the position that the Commission's regulation came within this authority although it had the practical effect of nullifying the provision of § 10(e) granting exemption on the ground of sale without profit. The court took the position that because the Commission's regulation had been in effect for several years it should not be disturbed. It said that the term profit in the statute should not be given its commonly understood meaning because the statute

> "was written for technicians, not for laymen". (*id.* p. 11a).

Finally the court said that it would not apply the meaning of the term "profit" applied in relation to the sale of power in various Congressional enactments and in one of its own recent decisions because to do so would not help defray the Federal Power Commission's administrative expenses (*id.*).

Reasons For Granting The Writ

The Court Below Erroneously Decided Important Questions Of Federal Law Which Should Be Settled By This Court.

The St. Lawrence and Niagara Projects are two of the largest hydroelectric projects in the world. The St. Lawrence Project is one of the world's greatest navigation projects. Petitioner's claim for exemption from license charges on the ground that the St. Lawrence Project was primarily designed for navigation is a novel and important one and for that reason should be reviewed by this Court. The determination of the court below with respect to petitioner's claim for exemption on the ground that power is sold with-

out profit involves questions of law which apply not only to the St. Lawrence and Niagara Projects but also to other projects and which never have been passed upon by this Court. This is a matter of wide and substantial interest and one upon which the parties concerned are entitled to have this Court's judgment.

In effect, the court below refused to review respondent's determination on the merits despite the fact that petitioner's claims for exemptions on both grounds involve strictly questions of law.

A.

The Court Below Erroneously Rejected The Claim For Exemption Based on Primacy Of Navigation.

The St. Lawrence River has been used for navigation from the sea to the interior of the United States and Canada since before 1800. The velocity of the water in the 40-mile reach known as the International Rapids where the St. Lawrence Project was constructed as well as in other reaches of the river required a great many miles of canals. The original canals had drafts of only one or two feet. Historical records differ as to which. For many years prior to the construction of the modern St. Lawrence Project the canals had a draft of 14 feet (A. 260).

In all efforts to bring about the project, the emphasis was on navigation and the reason for the failure of the efforts was that the interests in favor of improving navigation were not able to overcome the opposition of interests opposed to its improvement (A. 266-268).

The 1940 engineering report referred to in the opinion of the court below which provided the general plan pursuant to which the St. Lawrence Project was ultimately built had for its main purpose the provision of a safe route for ocean-going ships to carry cargo to and from the interior of the United States and Canada in the war period. Thus here again the emphasis was on navigation rather than power although power was an integral part of the plan.

The 1940 report broke down the work to be accomplished into the three categories of works solely for navigation, works common to navigation and power, and works solely for power, for very definite reasons. They were based on the fact that it was intended that the United States Government construct all the works needed solely for navigation and all the works common to navigation and power and that a Canadian entity construct the works needed solely for power in Canada and a New York State agency construct the works needed solely for power in the United States (A. 299-300). The power works of course were turbines, transformers and transmission facilities. As indicated in the court's opinion the cost of those located in the United States as ultimately constructed constituted only about one-fifth of the total cost of the work performed by the Authority (Appendix p. 8a).

One of the dams (Iroquois) which is nearly 30 miles upstream from the other two is of absolutely no use whatever for power. However the power entities were required to pay for it and it was petitioner which built it (A. 28, 37).*

Contrary to the understanding of the court below as expressed in the opinion, the 1940 plan was modified in several ways including the requirement for additional channel excavation solely for the benefit of navigation. The power entities were required to carry out much of this solely at their expense (A. 30-31).

As the court's opinion indicates the works common to navigation and power would have been built differently and much more cheaply if constructed for power purposes alone. Other works the Power Authority and its Ontario counterpart were required to build would not have been

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* The Authority's original application to the Federal Power Commission for a license did not include Iroquois dam among the facilities which it proposed to construct. However in order to obtain the license it was forced to amend the application and to agree to build the dam (A. 29).

constructed at all if power production were the sole or principal goal. The opinion fails to state that the Power Authority did much construction for the benefit of navigation which was of no value for power. In fact the opinion mistakenly implies that the Authority did no such work (Appendix p. 8a).

There is no question whatever that the project as a whole was primarily designed to provide or improve navigation. Respondent conceded this (A. 197-198).

There is no question whatever that the work performed by the Power Authority, some of which was solely for power, some for both navigation and power and some solely for navigation, was a component and completely essential part of the whole. The facilities which resulted from this work were designed for the carrying out of the functions of the project which were primarily navigation and secondarily power (*supra*, pp. 10-13).

The project would have been a completely different one if its purpose was not the providing and improving of navigation which was brought about by making the International Rapids Section of the river available for ships of 27-foot draft instead of the smaller ships which could be accommodated by the much more numerous and longer canals and their locks (A. 134).

Thus, even if the very narrow interpretation of the word "project" adopted by the court below is the correct one—which we believe it is not—the Federal Power Commission was not justified in refusing to find that the project works constructed by the Authority were primarily designed to provide or improve navigation. These works could not be carved out of the whole project. To sustain its adoption of a very narrow definition of the word "project" the court below cited the opinion of the District of Columbia Circuit in *Lake Ontario Land Dev. Ass'n* v. *F. P. C.*, 212 F. 2nd 227 (1954). In fact that case supports petitioner's contention that the word "project" as used in § 10(e) should be held to have a broad rather than a narrow meaning.

As the court's opinion indicates the language of the statute is to some extent inconsistent,* but as the opinion fails to recognize, under a reasonable interpretation of the statute consideration should be given to the fact that the Power Authority was required to spend millions of dollars solely for the benefit of the government's navigation activities in carrying out construction work and donating land to the government.** Consideration should also be given to the fact that over the period of the license it is being required to expend large sums for the benefit of navigation in regulating the St. Lawrence River and Lake Ontario for the benefit of navigation and is required to operate the project in such a fashion that it loses revenue because it holds back water and releases it to the prime advantage of navigation rather than power pursuant to orders of an international Board of Control which is required by the 1909 Treaty and domestic law to give precedence to navigation over power (A. 20-25, 32-33, 107-108).

The St. Lawrence Project is managed for the prime benefit of navigation not only during the navigation season but during the winter months. Both the 1940 engineering plan and the modified plan adopted by the International Joint Commission in 1952 were conceived on the principle that the water discharged from Lake Ontario through the St. Lawrence River would not be allowed to run its natural course but would be held back and released pursuant to a regulation plan which would produce optimum use of the water primarily for navigation and shore interests. After

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* There is no inconsistency about the fact that § 3(11) of the Act defines "project" as a "complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are part of said unit * * *" and that § 10(e) provides that when "projects" are designed primarily to provide or improve navigation licenses shall be enjoyed without charge.

** Article 10 of the license required the Authority to convey to the Seaway Corporation free of charge so much of its lands as the corporation wanted for its purposes (A. 161-162).

these interests are served the water is to be regulated in the interest of power (A. 20-25). Thus during the current period in which as the Court may take judicial notice the waters of the Great Lakes are the lowest of the 104 years in which records have been kept, the Power Authority and its Canadian counterpart are required to hold back water in Lake Ontario during the winter months when it desperately needs water for power in order that it be available to serve the interest of navigation in the summer.

The plan of river regulation specifically authorized by the International Commission's October 29, 1952 order has been modified several times since and each order is designed first for the protection of the riparian owners on Lake Ontario and navigation interests (A. 107-108).

Thus contrary to the assumption of the court below as evidenced by the last two pages of its opinion the equities are all on the side of the Power Authority. The Authority does much for the government but the government acting through the Federal Power Commission does nothing for the Authority.

The Court of Appeals' opinion does not say that the Commission's factual determination was right. It does say that the preference given to navigation over power as indicated in examples set forth in the opinion and the fact that the works built by the power entities would not have been built so expensively if not intended to serve the interests of navigation "need" not prove that the project within the narrow definition adopted by the court was primarily designed to provide or improve navigation and that § 313(b) of the Act prevents it from exercising a review of the Commission's determination (Appendix, pp. 7a-9a).

We believe the court was wrong in holding this to be the type of situation where a factual determination of an administrative body may be reviewed only in the limited way provided for with respect to straight factual situations by § 313(b) of the Act. This is not a case where there is a dispute as to facts. The facts are a matter of

public and historical record. What is involved is an interpretation of the language of the statute in the light of undisputed facts and an application of the undisputed facts to the provisions of the statute as so interpreted.

There is no evidence whatever in the record, let alone substantial evidence, that any of the facilities built by the Authority except power producing and transmitting facilities such as turbines, generators and transformers were designed primarily for the production of power. On the contrary the evidence shows that the bulk of the works it constructed were designed primarily in the interest of navigation. This is true of dams, one of which had no value for power, channel improvements and other features.

Thus what is involved is a question of law which the Court of Appeals had complete jurisdiction to decide and which it should have decided with precisely the opposite result from that reached in the decree which this Court is asked to review.

B.

The Court Below Erred In Rejecting The Claim For Exemption Based Upon The Sale Of Power Without Profit.

The court below rejected the Power Authority's claim for exemption based upon its contention that it sells power without profit. The court recognized that the power is sold without profit within the ordinary common-sense meaning of the term "profit" but refused to find that the term as used in the statute has an everyday common meaning. The court's opinion indicates that it did so on the grounds:

> (i) that the Commission's administrative interpretation of the statute which was contrary to the interpretation advanced by the Authority had gone unchallenged over a period of many years except for one court test in Nebraska in 1947 which was decided in favor of the Commission which in 1946 had considered the matter for the first time.

(ii) that § 309 of the Act authorizes the Commission to prescribe regulations to carry out the Act's provisions "including definitions of 'accounting, technical and trade terms' ".

(iii) that the Authority's contention that the Commission's Regulation 11.24(d) is invalid on its face because on the one hand it allows amortization as a deductible expense in figuring profit and on the other hand inconsistently excludes amortization of the principal of bonds as a deduction is a "quibble".

(iv) that the "more commonly understood meaning of the word" profit should not be applied to its use in the Act because the Act "was written for technicians, not for [illegible]men".

(v) that the fact that various Congressional Acts and even a recent decision of the court below treat power activities carried on by entities such as the Authority as being carried on without profit has no relevance because the Congressional Acts and the court's decision were not concerned with the problem of "who should be required to help the Federal Power Commission defray the Commission's administrative expenses." and

(vi) that the fact under the Commission's regulation the exemption provision of the Act is completely nullified except with respect to public power producers which operate at a loss was disposed of in the Nebraska case as a matter of policy not within the cognizance of the courts, thus begging the question of the meaning of the statute.

1. The Administrative History Argument

Section 10(e) of the Act including its provision that public bodies shall be exempt from annual charges imposed by the Commission to the extent that power is sold to the public without profit has been in the Act since 1920. The Commission's Regulation 11.24(d) which in effect defines the term

"profit" and which the Authority has challenged and the Court of Appeals has upheld has existed in its present form since 1938. The court's opinion points out that the only recorded challenge to the validity of the Commission's interpretation of the term "profit" as used in § 10(e) was made by the Central Nebraska Public Power and Irrigation District which *unlike* the Power Authority is authorized to make a profit in the business sense. In 1946 the Commission rejected the District's challenge by a three to two vote (5 F. P. C. 165 (1946)). The majority based its decision in large part on the proposition that while *Central Nebraska* was the first case in which the Commission had been called upon to make a formal interpretation of the statute it had been levying charges against public agencies in accordance with the definition of "profit" adopted by the majority over a period of years. In 1947 the Court of Appeals for the Eighth Circuit affirmed the Commission on the ground that Central Nebraska was authorized by statute to and actually did make a profit in the business sense. The court also based its decision on the proposition that the Commission's interpretation of the statute had gone unchallenged for many years. *Central Nebraska Pub. Power & Irr. Dist.* v. *Federal Power Commission,* 160 F. 2d 789 (1947), *cert. den.,* 332 U. S. 765.*

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*There appears to have been one other challenge to the Commission's interpretation of § 10(e). It was begun in 1942 by the South Carolina Public Service Authority in litigation mentioned by the court below in connection with the issue of whether petitioner is entitled to exemption on the ground that the project was primarily designed for navigation. *South Carolina Public Service Authority* v. *Federal Power Com'n,* 200 F. 2d 78 (1952). In addition to its claim that the South Carolina project was primarily designed for navigation that authority contended that as an agency of the State it was incapable of making a profit. The Commission rejected this claim because the authority admitted that it had excess revenues which its enabling act required to be turned into the state treasury (11 F. P. C. 12, 34 (1952)). The South Carolina Authority accepted the Commission's decision on that aspect of the case and did not ask the Court of Appeals to review it along with the navigation question.

The court below in turn rejected the Power Authority's challenge to the Commission's interpretation of the statute as applied to it. This challenge was made immediately after the Authority received the first bills submitted by the Commission in connection with the St. Lawrence Project which was licensed in 1953. In doing so the court appears to have relied heavily on the decision in the *Central Nebraska* case and upon what it understood to be the history of the Commission's administrative interpretation of the statute both before and after *Central Nebraska.*

This administrative history does not have the significance which on its face it appears to have. The Commission's interpretation of the term "profit" in the statute undoubtedly went unchallenged largely because bills submitted to public licensees from which the Commission sought to collect charges prior to *Central Nebraska* and in the interval between the *Central Nebraska* decision and the Authority's challenge were so miniscule that such licensees had little motive for going to the expense of litigating the issue and because the public agencies to which the bills were submitted were organizations of a type different from the Authority and undoubtedly in many cases did make a profit.

Prior to the licensing of the Power Authority's St. Lawrence Project all the great public hydroelectric power projects in the United States were built by agencies not under the jurisdiction of the Federal Power Commission, e.g., the Tennessee Valley Authority, the Bureau of Reclamation, the Corps of Engineers.

The litigation involving Central Nebraska's challenge to the Commission's interpretation of the profit provision of § 10(e) of the Act actually involved charges for the years 1942 and 1943 although the Commission's decision was not rendered until 1946 and the Eighth Circuit's decision until 1947.

Prior to 1942 there was not a single public licensee which paid charges amounting to $1,000 per year (1940 F. P. C. Annual Report Appendix B, pp. 131-139).*

In 1945-1946 the total of all charges against state or municipal projects was about $25,000 (of which $16,000 was paid by the City of Seattle) as compared with $139,145 billed against the Power Authority's two projects for 1963. It undoubtedly cost the government more to collect the charges than it took in.

The Commission's 1946 decision in the *Central Nebraska* case indicated clearly that this was the first occasion that the Commission issued a formal decision on the meaning of the word "profit".

It appears from the Federal Power Commission reports that there were less than 30 public licensees of hydroelectric projects which had paid any charges at all let alone any substantial charges prior to 1946. The reports indicate that most of those which did pay anything were municipalities and there is no indication whatever that any of the public licensees which paid charges were organizations constituted like the Authority which finance their projects by the sale of revenue bonds and take in no more money than necessary to operate and maintain the projects and meet bond commitments. Thus prior to the *Central Nebraska* case there was no administrative interpretation of the statute similar to the one made with respect to the Authority which is the subject of this litigation. As pointed out

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*This was the last Federal Power Commission report indicating charges billed annually until after World War II. From 1946 through 1955 such information was again published. After 1955 publication was discontinued but in the last few years each licensee's bill has included a statement of charges billed against other public projects (A. 111). There is no published information as to what charges are actually paid. On the argument in the court below counsel for the Commission stated that a large percentage of the bills rendered are not paid. He indicated that large parts of the charges are exempted on the ground that the power involved is used for municipal purposes.

below the facts with respect to *Central Nebraska* were very different from the facts in the Authority's case.

No new large projects became subject to annual charges between 1947 and the licensing of the Power Authority's St. Lawrence project in 1953.

The one public agency constituted anything like the Power Authority which became subject to charges during that period was Public Utility District No. 1 of Chelan County, Washington which took over a project from a private company. However, it did not do so until about the time of the issuance of the Authority's St. Lawrence license.

Thus not only prior to 1947 but from that time to the time of the Authority's challenge to the Commission's interpretation of the term "profit" as applied to its St. Lawrence Project there was no history of administrative interpretation of § 10(e) of the Act by which the court below should have considered itself bound.

The facts in the *Central Nebraska* case were very different from those in the case at bar. The Central Nebraska District was authorized by state law to make a profit in the business sense and did in fact make such a profit. The District in claiming exemption from charges on the ground that it was selling power without profit within the meaning of § 10(e) of the Act sought to count as expense amortization of bonds and *unlike* the Authority also sought to count depreciation of facilities.

The District's argument was that it was entitled to exemption because whatever profit was made inured to the benefit of the public.

The Eighth Circuit rejected this argument and held that since Central Nebraska was making a profit it did not come within the exemption provided by the statute. The court's opinion does not discuss the Commission's regulation at all and the court had no occasion to pass on the validity of the regulation. It certainly had no occasion to pass on it as applied to an organization such as the Power Authority.

2. The Court's reliance on the provision of § 309 of the Act Authorizing the Federal Power Commission to Adopt Regulations to Sustain its Approval of the Commission's Regulation 11.24(d).

The court relied on § 309 of the Act to sustain the Commission's interpretation of § 10(e). Section 309 authorizes the Commission to prescribe regulations to carry out the provisions of the Act "including definitions of accounting, technical and trade terms." The court should not have relied on § 309 because that section is a procedural one and does not authorize the Commission to change the meaning of the statute whose administration its regulations should be designed to facilitate.

Section 10(e) of the Act provides exemption from annual charges to the extent that project power is sold to the public without profit. What is and is not profit depends upon the meaning of the Act and the Commission has no power whatever to change that meaning under the guise of adopting a regulation which completely fails to carry out the purpose of the Act or to conform to its meaning.

On this point the court below cited *Public Service Commission* v. *Federal Power Commission*, 327 F. 2d 893, 896-897 (1964), which discussed a provision of the Natural Gas Act (15 U. S. C. § 717o) similar to § 309 of the Federal Power Act.

The situation in that case was nothing like the situation involved in this case.

In the Gas Act case the Commission promulgated a regulation implementing a statute which gave it authority to issue temporary certificates in cases of emergency. The regulation defined emergency situations. The definition did not contradict the words of the statute involved. Rather it conformed to it. This is completely different from the instant case where the Commission has gone outside the statute to give the word "profit" a meaning not in conformance with common use and one which nullifies the provision of the statute in which the word is used.

3. The Court's Characterization as a "Quibble" the Authority's Contention That Regulation 11.24(d) is Invalid on its Face Because of Inconsistency.

The Authority challenges the validity of Regulation 11.24(d) on the ground that by its very terms it is so inconsistent as to be inoperative. The Regulation reads:

> "No State or municipal licensee shall be entitled to exemption from the payment of annual charges on the ground that power generated, transmitted, or distributed by the project is sold to the public without profit, unless such licensee shall show:
>
> * * *
>
> "(2) That an income statement, prepared in accordance with the Commission's Uniform System of Accounts, shows that the revenues from the sale of project power do not exceed the total amount of operating expenses, maintenance, depreciation, *amortization,* taxes, and interest on indebtedness, applicable to the project property. *Periodic accruals or payments for redemption of the principal of bonds or other indebtedness may not be deducted in determining the net profit of the project*". (emphasis added)

The main body of the regulation recognizes that amortization is a proper item for deduction in determining whether a public agency makes a profit on the sale of power. Amortization of course means the periodic paying off of indebtedness used to finance a public project. In a proviso at the end of the regulation constituting a separate sentence, the Commission specifically nullifies what is stated in the body of the regulation and decrees that periodic payments for the redemption of the principal of bonds may not be deducted.

Certainly the term "amortization" in the main body of the regulation can have no meaning except periodic payments of redemption of principal.

Thus the regulation is inconsistent and palpably invalid on its face.

The result of the Commission's regulation is that only those public entities which not only have a bookkeeping loss but also are in default in their obligations are exempt from the payment of annual charges. This is palpably absurd.

As pointed out in the opinion of the court below the Authority has no way in which to finance its two projects except by borrowing money through the sale of bonds which are to be paid off out of revenues received from the sale of power. As also pointed out, the Authority is forbidden by law to charge more for power than is necessary to operate and maintain its facilities and pay off its bonds. When the bonds are paid off rates must be reduced so that they will cover only operation and maintenance (Appendix, p. 9a).

If this arrangement does not constitute sale of power without profit it is impossible for a public organization like the Authority to sell power without profit.*

Unlike the public body involved in the *Nebraska* case the Authority in keeping its accounts does not set up an item of depreciation. It has no occasion to do so.

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* Federal and State law require the Authority to sell power to consumers at the lowest possible rates. (N. Y. Pub. Auth. L. § 1005; Niagara Redevelopment Act (16 U. S. C. §§ 836, 836a)). In compliance with this mandate the Authority's rates have been set as low as possible consistent with meeting its obligations under average normal water conditions. During the current period of extreme low water the Authority is unable without raising rates —which it is very reluctant to do—to take in each year the amount of money it is required to take in under its bond indenture. It is now taking in barely enough to meet the minimum amortization requirements established in its agreement with the bondholders. The bond agreement requires that if feasible it take in 1.4 times those charges each year and use the overage to call bonds. That provision was for safety purposes and contemplated that bonds would be paid off in about 35 years instead of in a maximum of about 50 years. If the rates had not been designed to provide the 1.4 coverage under average conditions but had been designed to bring in the bare minimum required each year the revenues would now be so low that the Authority would be in default unless it raised its rates.

In making its case against the Commission's levy of charges the Authority perforce must treat with the Commission's regulation which on the one hand says that amortization is a deductible item and on the other hand says it is not. Inasmuch as it must treat with the regulation its challenge of the regulation as invalid certainly is not a "quibble".

4. The Court's Holding that the Word Profit Should Not be Given its Ordinary "Commonly Understood" Meaning Because the Act was Written for "Technicians."

The court's reliance on the proposition that "the Federal Power Act was written for technicians, not for laymen" to justify its refusal to apply the common everyday meaning of the word "profit" to its interpretation of the word in the statute was misplaced.

The members of the Federal Power Commission are anything but technicians. They are not chosen because of any technical ability, particularly ability in the field of power production. From 1920 to 1930 the Commission consisted of the Secretary of War, the Secretary of the Interior and the Secretary of Agriculture. Since 1930 it has consisted of five men chosen by the President. An examination of the history of the body since 1930 will show that the bulk of them have been lawyers. For example, of the last ten members serving on the Commission nine have been lawyers. Of the five present appointees four are lawyers and one an accountant.

The Commission's examiners who make initial decisions on contested issues such as the one here involved are always or almost always lawyers.

Similarly the Commission's staff is composed largely of people including lawyers who have no expertise whatever in the business of producing electricity. In addition the legislative history of the Act shows that the people who drafted it and pushed for its passage and debated it were not "technicians".

The words of the Act should be given their common everyday meaning and the job of interpreting them is for the courts and not for technicians other than legal technicians. It is an elemental rule that words in a statute are to be given their ever day common sense meaning unless the language of the whole statute indicates to the contrary. *United States* v. *Witkovich,* 353 U. S. 194; *N. L. R. B.* v. *Coca-Cola Bottling Co.,* 350 U. S. 264; *De Gasay* v. *Lederer,* 250 U. S. 376.

There is no such indication in the statute here involved.

5. The Court's Refusal to Give any Weight to the Fact That Acts of Congress and One of its Own Decisions Have Denominated the Type of Activities Carried on by the Authority as Being Carried on Without Profit Because the Acts and the Decision Were Not Concerned With the Problem of "Who Should Be Required to Help the Federal Power Commission Defray the Commission's Administrative Expenses."

The court below refused to give any weight whatever to the fact that various statutes denominate the production and sale of power by public entities which finance the cost of their facilities by the sale and amortization of bonds as non-profit activities and the fact that the same Court of Appeals in *Merritt-Chapman & Scott Corp.* v. *Public Util. Dist. No. 2,* 319 F. 2d 94 (1963), *cert. den.* 375 U. S. 968 (1964), held that a Washington public agency which is constituted on lines almost identical with those of the Authority was carrying on its busines without profit. The opinion indicates that the court did so because the acts and the decision were not concerned with the problem of who should help pay the costs of running the Commission (Appendix p. 11a).

We believe the court erred in taking such a stand.

The Niagara Redevelopment Act which directed respondent to issue a license for development of power on the Niagara River to petitioner requires petitioner in disposing of one-half the project power to give "preference and prior-

ity to public bodies and *non-profit* cooperatives" (16 U. S. C. § 836). It also requires that petitioner's contracts with utility companies "organized and administered *for profit*" provide for withdrawal of power to meet the needs of public bodies and non-profit cooperatives.

The opinion of the court below referred to various other congressional enactments which relate to entities like the Power Authority which set power rates only high enough to enable them to retire indebtedness. These statutes treat such agencies as non-profit organizations (16 U. S. C. §§ 825 (s), 831(i), 832(b), 833(b), 833(e), 836 (b)(1)).

Thus the Tennessee Valley Authority is required to give preference in the sale of power to "cooperative organizations of citizens or farmers, *not organized or doing business for profit*" (16 U. S. C. § 831(i)); the Bonneville project is required to give preference to cooperatives (16 U. S. C. § 832(c)) which are defined as "*non-profit making organizations*" (§ 832(c)); and the Fort Peck project is required to give preference to cooperatives (§ 833(c)) which again are defined as "*non-profit making organizations*" (§ 833(b)).

The cooperatives which statute after statute describe as non-profit organizations finance their operations and set their rates very much like the Authority except that instead of borrowing money from private purchasers of bonds they borrow the bulk of it from the government through the Rural Electrification Administration. The law and the contracts with the Administration require that they repay the amounts borrowed in installments and that they set their rates high enough to cover operations, maintenance and amortization of payments.

If these organizations operate without profit the Authority likewise operates without profit.

There is no reason whatever to hold that the word profit has a different meaning in § 10(e) of the Federal Power Act from the meaning ascribed to it in the Niagara Redevelop-

ment Act, which specifically authorized one of the Authority's two projects, and in the other statutes referred to above.

Of course it is possible for a public agency to make a profit in the sale of power and thus be outside the exemption provided in § 10(e) of the Act. For example if a village with an electric plant sets its rates so high that in addition to covering operation, maintenance and amortization of the cost of facilities they produce revenue out of which streets are paved and fire trucks purchased it in truth and in fact makes a profit within the common meaning of the term. Such a village would of course be operating differently from the Authority and the cooperatives which are forbidden by law to operate in such a fashion. On the other hand such a village's operations would be akin to those carried on by the Central Nebraska Public Power and Irrigation District.

The reasonable meaning of the word "profit" is demonstrated in an opinion of the Court of Appeals for the Second Circuit in *Merritt-Chapman & Scott Corp.* v. *Public Util. Dist. No. 2, supra,* which the same court refused to apply in this case.

There the court was asked to hold on the authority of *Harman* v. *City of Fort Lauderdale,* 134 Misc. 133 (Sup. Ct. New York Co. 1929) that the activities of the Grant County Public Utility District of Washington are proprietary and that its property in New York is therefore subject to attachment. It distinguished the *Harman* case on the ground that the agency involved there appeared to have conducted its operations for the purpose of earning a profit whereas the Grant County District clearly did not make a profit.

The court said:

> "While the District may have 'earnings' or 'revenue' from the operation of the Priest Rapids Production System, this is solely in the accounting sense that income exceeds expenses, and all such revenues must be applied either to retire indebtedness, to

establish working capital and reserves for expansion and contingencies, or to reduce or stabilize rates.*

* * *

"Finally, it may be noted that in the cases cited by *Harman* which hold or declare activities to be proprietary it appears that the courts believed the operations would be conducted for the purpose of earning 'profit', in the same manner that profit is earned by a business. In the instant case, however, the record clearly establishes that sales under the purchase contracts will be entirely at cost, and that any 'revenues' which the District may have in the accounting sense that income exceeds expenses will be expended to retire indebtedness, establish working capital and reserves for expansion and contingencies, or reduce or stabilize rates. It appears that in *Harman* the record did not establish this absence of business type 'profit,' and for this reason alone, without considering the federal governmental aspects of the matter, *Harman* is distinguishable from the case before us." (319 F. 2d at pp. 99, 107 footnote omitted)

The fact that § 10(e) of the Act is concerned with the collection of license charges to help defray the costs of the Commission's operation is no basis for giving the word "profit" as used in that statute a different meaning from that applied to it generally in statutes and court decisions.

As pointed out above, the Power Authority has undertaken a great burden at the cost of many millions of dollars to aid navigation on the St. Lawrence River for the benefit of the Government and together with its Canadian counterpart operates the St. Lawrence Project in the interests of navigation and at the expense of power production. It was situations like this which Congress undoubtedly had in mind when the profit exemption provision of § 10(e) was adopted. There is nothing in the statute to indicate that Congress intended to require a licensee to contribute greatly toward

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*The Power Authority under its law is not authorized to set aside any reserve for expansion. It is authorized to build and operate only two projects and must dispose of the power produced without profit (N. Y. Pub. Auth. L. §§ 1002, 1005).

providing, improving and maintaining navigation and at the same time, even though it makes no profit in the ordinary meaning of the term, be required to contribute to the cost of administering the Federal Power Commission.

6. The Court's Apparent Making Of A Policy Decision To The Effect That Somebody Ought to Help Defray the Cost of Administering the Federal Power Act and That Therefore § 10(e) of the Act Should Be Construed in Such a Way as to Nullify Its Provisions With Respect to Exemption On the Non-Profit Ground Except With Respect to Entities Which Operate At a Loss.

After suggesting that someone should be required to help defray the Commission's expense the court below ended its opinion as follows:

> "The nub of the Power Authority's attack on Regulation 11.24(d) is that the regulation allows an exemption only to those public power producers who operate at a loss. To this objection we repeat the response given in *Central Nebraska Pub. Power Dist.* v. *FPC*, *supra*, 160 F. 2d at 786:
>
> "'[T]he yardstick of profit or loss from sales of power prescribed by Congress to measure liability for or exemption from annual charges may not be in all aspects and incidents the best means of advancing the broad object of the Act to aid in the development of power from natural resources. . . . But we think that in substance the arguments for the allowance of the exemption to this District, which does receive an excess of income from sales to the public, go the policy of the statute which is not for the courts.'" (Appendix, p. 12a).

We respectfully disagree with the statement that the nub of the Authority's attack on the regulation is that it allows exemption only to public power producers which operate at a loss. We do maintain that the fact that it is true that under the regulation only agencies which operate at a loss are eligible for exemption indicates the invalidity of the regulation because in effect it nullifies the statute

which it is designed to implement.* However our attack on the regulation is more basic. We attack it because it completely disregards the plain everyday meaning of the word "profit" as used in the statute, because it disregards the obvious purpose of the statute and because as pointed out above it is so inconsistent according to its very terms as to be invalid.

The language quoted by the court below from the Eighth Circuit's opinion does not answer the Authority's attack on the regulation.

In the first place that opinion does not even discuss the regulation. As pointed out above and in the opinion below the Nebraska agency made a profit in the ordinary business sense and the Eighth Circuit so held. The Nebraska agency did not attack the regulation as the Authority does but rather argued that all public agencies are entitled to exemption even though making a profit because the profit inures to the benefit of the public. Since the facts were different from those in the case at bar the Eighth Circuit did not need to reach the validity of the regulation and its opinion indicates that it did not do so.

In the second place the quoted language which is concerned with the statute rather than the regulation begs the

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* In the *Central Nebraska* case the then Chairman of respondent in rendering the principal dissenting opinion said:

> "Central Nebraska, I believe, rightly urges that the law requires an absurd and impossible thing if it contemplates that a State or municipal agency's revenues each year should exactly balance its costs for it to be exempt from annual licensed project charges. In other words the Congress should not be presumed to have prescribed something which runs counter to the sound conduct of the public business of selling power.
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> * * *
>
> "The record of Commission action in such cases shows that public undertakings have qualified for full exemption from licensed project charges under the Commission's interpretation of section 10(e) of the Act only by selling no power or operating in the red. This appears to me the *reductio ad absurdum* of the present interpretation of the Congressional intent." (5 F. P. C. 174, 179)

question of the correctness of the Commission's interpretation of the statute. Having done so by assuming the Commission's interpretation was correct it then stated that while the statute as so interpreted was not designed to further the broad purposes of the Act, nevertheless a policy problem was involved which could be resolved only by Congress.

We respectfully maintain the Eighth Circuit's statement that if the statute is interpreted the way the Commission interpreted it the purposes of the Act are not being achieved gives strong support to the proposition that the interpretation is not the correct one.

Unlike the Nebraska District the Authority does not borrow money from the Government. It does not "receive an excess of income from sales to the public" except in the professional accounting sense alone. It does not make a profit within the common ordinary meaning of the term. As we have demonstrated the equities are all on the side of the Authority and the words of the Act should not be construed to have a meaning other than a common sense ordinary meaning so as to conform with a policy which there is no showing Congress ever adopted.

Conclusion

For the foregoin , reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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STEPHEN D. FINALE,
SCOTT B. LILLY,
LEWIS R. BENNETT,
Of Counsel

April 8, 1965.

APPENDIX

OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75—September Term, 1964.

(Argued October 15, 1964 Decided December 8, 1964.)

Docket No. 28806

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

Before:

WATERMAN, MOORE and SMITH,
Circuit Judges.

Petition by Power Authority of the State of New York to review an order of the Federal Power Commission, 51 PUR3d 417, denying in part an exemption from annual charges under 16 U. S. C. § 803(e). Order affirmed.

THOMAS F. MOORE, JR. (Edward L. Ryan, Scott B. Lilly, Lewis R. Bennett, of counsel), New York City, *for Petitioner.*

RICHARD A. SOLOMON, General Counsel; Howard E. Wahrenbrock, Solicitor; Joseph Hobbs, Donald Sander, Attorneys, Federal Power Commission; Paul A. Sweeney, Special Consultant, *for Respondent.*

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* This and the following page numbers were certified by the court below. They follow the pages of the joint appendix which was filed with the court below and which also has been certified by it.

WATERMAN, *Circuit Judge:*

On July 15, 1953, the Power Authority of the State of New York was issued a license by the Federal Power Commission to construct certain power and navigation works on the St. Lawrence River. Article 27 of the license provided for the payment of annual charges by the Power Authority to the Commission in accordance with Section 10(e) of the Federal Power Act, 16 U. S. C. § 803(e).[1] The works having been constructed, the Power Authority was billed for the charges beginning July 17, 1958.

The Power Authority thereupon applied for total exemption from the charges under the proviso to Section 10(e):

> "[L]icenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; . . ."

The Power Authority claimed that the project in which it was engaged was primarily designed to improve navigation, and it also claimed that the power it produced was either used by it for state or municipal purposes or was sold ultimately to the public without profit. The Commis-

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1 "All licenses issued under sections 791a-823 of this title shall be on the following conditions:

* * * * *

"(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of sections 791a-823 of this title; . . ."

sion denied the application in large part, but subsequently granted a rehearing. The new proceedings, expanded by stipulation to cover charges imposed through December 31, 1961, commenced in 1962. Following an extensive hearing, the examiner rendered an initial decision in 1963, in essence upholding the prior determination.

On January 13, 1964, the Commission issued a final order, affirming the hearing examiner's decision. 51 PUR3d 417. The Commission conceded that the Power Authority is a municipality within the meaning of Section 10(e) of the Federal Power Act. It ruled, however, that the project in which the Power Authority is engaged was not primarily designed to provide or improve navigation, and that the power sold by the Power Authority ultimately for public use was not sold without profit.[2] The Power Authority, pursuant to Section 313(b) of the Federal Power Act, 16 U. S. C. § 825 l(b), petitions for review of these rulings.

Was the project designed primarily to provide or improve navigation?

The history of the St. Lawrence development program furnishes a useful introduction to this question. In 1909 the United States and Great Britain entered into a treaty providing for the use and development of boundary waters between the United States and Canada and creating an International Joint Commission to pass on any projects which would affect the flow or level of the boundary waters. Although numerous proposals to carry out the purposes of the treaty were offered during the next thirty years, no action was taken on them, apparently because of objections to their navigational aspects.

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2 The Commission also determined that the entities to whom the Power Authority sold power for resale to the public resold the power at a profit. We find it unnecessary to reach this alternative ground for denying the exemption to the Power Authority.

In 1940, a comprehensive report on the development of the St. Lawrence River was filed by a committee composed of engineers from the United States and Canada. The report divided the work to be done into three categories: works solely for navigation, works primarily for power, and works common to navigation and power. An executive agreement between the United States and Canada, providing for implementation of the report, was signed the following year, but it failed of approval by the United States Congress, as was required in the agreement.

Finally, in 1951, the President of the United States and the Prime Minister of Canada reached an understanding designed to break the stalemate. The works designated in the 1940 report as primarily for power and common to power and navigation were to be built by the United States and Canada under the 1909 treaty. The works designated as solely for navigation were to be built by Canada alone, unless the 1941 executive agreement was concurred in by Congress, in which case they would be built jointly by the two countries.

In 1952 the portion of the program to be built under the 1909 treaty was submitted to the International Joint Commission and was approved by that body. The Canadian government had already chosen the Hydro-Electric Power Commission of Ontario to do Canada's share of the work. The following year the Power Authority of the State of New York was selected by the President of the United States to construct the works on the American side of the St. Lawrence. At the same time, the Power Authority applied to the Federal Power Commission and was granted a license in accordance with the plans approved by the International Joint Commission.

In 1954 the United States Congress finally enacted legislation authorizing American participation in construction of the portion of the program designated as solely for navi-

gation. The St. Lawrence Seaway Development Corporation was created to do this country's share of the work. The St. Lawrence Seaway Authority of Canada had already been chosen to make the improvements on the Canadian side of the St. Lawrence. Work began immediately on all phases of the program and by 1959 the entire development was virtually complete and in operation.

Our first task is to define the boundaries of the "project" whose primary purpose is at issue.[3] The Federal Power Commission ruled that the project consists only of the works licensed to the Power Authority in 1953 and the land on which they are located. The Power Authority contends that it encompasses the complete St. Lawrence development program. In resolving this disagreement, the decision of the United States Court of Appeals for the District of Columbia in *Lake Ontario Land Dev. Ass'n* v. *FPC*, 212 F. 2d 227 (1954), *cert. denied*, 347 U. S. 1015 (1954), is most illuminating.

That case involved a challenge to the legality of the license issued to the Power Authority by the Federal Power Commission. One branch of the challenge was based on Section 14 of the Federal Power Act, 16 U. S. C. § 807. The section provides that ". . . the United States shall have the right upon or after the expiration of any license

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3 According to 16 U. S. C. § 796(11):

"'[P]roject' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;"

to take over and thereafter to maintain and operate any project . . . covered in whole or in part by the license . . ." Petitioners there argued that because the United States could not take over the part of the project located in Canada, a license could not be issued for the part of the project located in this country.

The court apparently assumed, at that point and throughout its opinion, that the "project" consisted of the works to be constructed jointly by the Power Authority and Ontario Hydro. It accommodated the language of the statute to this concept of the project by construing Section 14 to mean that "the United States shall have the right to take over the whole of the project so far as it has jurisdiction to take it over." *Id.* at 234. Thus the court initially drew the boundaries of the project broadly, and then, in effect, narrowed them to conform to the wording of the statute and to the practical necessities of an international undertaking.

We are inclined, for the sake of judicial interpretative consistency, to adhere to the broader definition of the project adopted by the District of Columbia Circuit in the first instance. However, as a practical matter, it makes no difference whose view—the court's, the Power Authority's, or the Commission's—we accept as our starting point, for, as in the *Lake Ontario* case, the language of the Federal Power Act requires us ultimately to resort to the narrow concept of the project as being the works licensed to the Power Authority and the land on which those works are located.

The portion of Section 10(e) with which we are now concerned relates to "licenses . . . issued" for "projects constructed . . . by States or municipalities." 16 U. S. C. § 803(e).[4] The only part of the project in connection with

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4 We are aware of the fact, insisted upon by the Power Authority, that the Federal Power Commission, strictly speaking, licenses "project works," not "projects." 16 U. S. C. § 797(e); *Lake Ontario Land Dev.*

which a license was issued by the Federal Power Commission was the part licensed to the Power Authority. Likewise, the only segment of the project constructed by a state or municipality was the segment constructed by the Power Authority. Accordingly, if Section 10(e) applies here, it applies to the "project" *so far as* a license in connection therewith was issued to the Power Authority. Compare the interpretation of Section 14 by the District of Columbia Circuit, *supra*.

The sole alternative to this reading of Section 10(e) is that it applies only to projects *wholly* licensed to states or municipalities by the Federal Power Commission. If the statute means this, no state or municipality, jointly engaged in improving navigation with an entity of a different kind, could ever be exempted from paying license charges. As was the District of Columbia Circuit, we are reluctant to inhibit joint undertakings in this way. The Commission is not in direct disagreement with this conclusion. Cf. 51 PUR3d at 420.

Our next task is to determine whether the project, as defined above, was "primarily designed to provide or improve navigation." The Commission found as a fact that it was not so designed. The only precedent on point, *South Carolina Pub. Serv. Authority* v. *FPC*, 200 F. 2d 78 (4 Cir. 1952), is of little help to us in reviewing this finding. Congress, however, in Section 313(b) of the Federal Power Act, has laid down the general rule that factual determinations by the Commission are conclusive "if supported by substantial evidence" 16 U. S. C. § 825 l(b).

Ass'n v. *FPC*, *supra*, 212 F. 2d at 232. The wording of Section 10(e) is thus inaccurate. We have chosen to remedy the inconsistency by reading "therefor" as if it meant "in connection therewith." The only plausible alternative would be to construe "projects" to mean "project works," in which case the Power Authority's view would be even more plainly unacceptable.

The finding of the Commission in this case was so supported. The Power Authority worked only on those portions of the overall St. Lawrence River program that were designated in the 1940 report as being primarily for power, or common to power and navigation, and never on those portions which were designated as solely for navigation. Furthermore, the authorizations granted to the Power Authority by the International Joint Commission, the President of the United States, and the Federal Power Commission refer almost exclusively to the production of hydro-electric power. Even the Power Authority concedes that one-fifth of its construction costs were for works that only benefited power production.

The Power Authority claims that the authorizations it was granted nevertheless gave primacy to navigational improvements. It points to the fact that the 1909 treaty on the development of boundary waters expressly preferred uses for navigation to uses for power, and that both the International Joint Commission and the Federal Power Commission recognized this preference as binding upon them when they issued their approval orders and provided for the implementation of those orders. But those expressions of navigational preference need only mean that in case of conflict power production must give way to unimpeded navigation. They no more prove that the primary purpose of the project was to facilitate navigation than a provision for a draw on a bridge over the St. Lawrence would prove that the primary purpose of the bridge was to aid navigation.

The Power Authority also contends that most of the major features of the project aid navigation as well as aid in the production of power; that they would have been designed differently, and less expensively, were it not for the aim of promoting navigation; and that these features have at times been operated contrary to the interest of

power production in order to advantage navigation. Assuming that all these contentions are true, again they need prove no more than that ease of shipping is an important secondary value of the project and at times should be given the right of way. The Commission was not required to regard these contentions as conclusive of the fact that the project was designed primarily for navigation.

Was the power sold ultimately for public use by the Power Authority sold without profit?

According to the law by which it was created, the terms under which its bonds were issued, and the contracts with its customers, the Power Authority must charge rates sufficient to cover its operating costs and to retire its capital debt within fifty years, but it may not charge rates in excess thereof. We may assume that the Power Authority has adhered in practice to these restrictions.[5] Nevertheless, the Commission ruled that the revenue collected by the Power Authority to retire its capital debt constituted "profit," and in reaching this result relied on the interpretation of Section 10(e) embodied in its Regulation 11.24(d), 18 C. F. R. § 11.24(d).[6] The Power Authority assails the regulation as invalid.

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5 The Commission determined that the rates set by the Power Authority also provide for reserves for contingencies, reserves for new construction, and accumulation of funds for working capital. However, the Commission has not pressed these determinations on appeal, and we find it unnecessary to take them into account.

6 "No State or municipal licensee shall be entitled to exemption from the payment of annual charges on the ground that power generated, transmitted, or distributed by the project is sold to the public without profit, unless such licensee shall show:

* * * * *

"(2) That an income statement, prepared in accordance with the Commission's Uniform System of Accounts, shows that the revenues from the sale of project power do not exceed the total amount of operating expenses, maintenance, depreciation, amortization, taxes,

Congress has authorized the Commission, by Section 309 of the Federal Power Act, to prescribe such regulations "as it may find necessary or appropriate to carry out the provisions of this chapter," including definitions of "accounting, technical, and trade terms" used in the act. 18 U. S. C. § 825h. The District of Columbia Circuit has construed the parallel portion of the Natural Gas Act as giving the Commission considerable discretion to choose the means by which the purposes of the act may be achieved. *Public Serv. Comm'n* v. *FPC*, 327 F. 2d 893, 896-97 (1964).

In its only previous challenge in the courts, Regulation 11.24(d) was upheld by the United States Court of Appeals for the Eighth Circuit. *Central Nebraska Pub. Power Dist.* v. *FPC*, 160 F. 2d 782 (1947), *cert. denied*, 332 U. S. 765 (1947). There the Power District was authorized by law to make ordinary business profits so as to provide for expansion, and it attempted to include depreciation as well as debt retirement in its operating costs. Hence the case may be distinguishable on its facts from the case before us, but the reasoning of the decision is fully applicable.

Noting that the Commission had, for twenty-five years, consistently interpreted "profit" in the accounting sense, as an excess of revenues over operating costs, the Eighth Circuit held that "this court may not upset the long settled administration of the Federal Power Act in this vitally important phase without clearly compelling reasons." *Id.* at 786. This holding was in accord with an established rule of statutory construction which was later applied to the Federal Power Act by the Supreme Court. *United States* v. *Public Utils. Comm'n*, 345 U. S. 295, 314-15 (1953). The passage of another seventeen years of consistent in-

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and interest on indebtedness, applicable to the project property. Periodic accruals or payments for redemption of the principal of bonds of other indebtedness may not be deducted in determining the net profit of the project."

terpretation by the Commission confirms the relevance of the rule to this case.

Apart from a futile quibble with the wording of the regulation, the Power Authority argues that "profit," as used in Section 10(e), signifies "business profit" rather than "accounting profit." It relies on the more commonly understood meaning of the word, and, in doing so, overlooks the fact that the Federal Power Act was written for technicians, not for laymen. It also points to various congressional enactments,[7] and to a recent decision of this court,[8] that treat entities which, like the Power Authority, set power rates high enough to enable them to retire indebtedness, as entities which operate on a "non-profit" or "cost" basis.

However, not one of these pronouncements is even remotely concerned with the problem of who should be required to help the Federal Power Commission defray the Commission's administrative expenses. Consequently, we find no merit in these contentions of the Power Authority We have in mind the trenchant warning of Walter Wheeler Cook:

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." "*Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L. J. 333, 337 (1933).

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7 16 U. S. C. §§ 825s, 831i, 832b, 832f, 833b, 833c, 836(b)(1).

8 *Merritt-Chapman & Scott Corp. v. Public Util. Dist. No. 2*, 319 F. 2d 94, 107 (1963), cert. denied, 375 U. S. 968 (1964).

The nub of the Power Authority's attack on Regulation 11.24(d) is that the regulation allows an exemption only to those public power producers who operate at a loss. To this objection we repeat the response given in *Central Nebraska Pub. Power Dist.* v. *FPC*, *supra*, 160 F. 2d at 786:

> "[T]he yardstick of profit or loss from sales of power prescribed by Congress to measure liability for or exemption from annual charges may not be in all aspects and incidents the best means of advancing the broad object of the Act to aid in the development of power from natural resources. . . . But we think that in substance the arguments for the allowance of the exemption to this District, which does receive an excess of income from sales to the public, go to the policy of the statute which is not for the courts."

Order affirmed.

DECREE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75 No. 28806 September Term, 1964

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

BEFORE:
WATERMAN, MOORE and SMITH,
Circuit Judges

DECREE

Pursuant to the opinion of this Court filed on December 8, 1964, it is

ORDERED by the court that the orders issued by the Federal Power Commission on January 13, 1964 (Opinion No. 415, 31 FPC 93, 51 PUR 3d 417) and February 27, 1964 (31 FPC 467, amended April 20, 1964, 31 FPC ——), which deny in part an exemption from annual charges under Section 10(e) of the Federal Power Act (16 U. S. C. § 803(e)) in connection with project works on the St. Lawrence River, are affirmed.

Per Curiam.

STEERY R. WATERMAN
LEONARD P. MOORE
J. JOSEPH SMITH

Dated:

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED JANUARY 12, 1965
A. DANIEL FUSARO, Clerk